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No. 39

In the Supreme Court of the United States

OCTOBER TERM, 1955

JAMES P. MITCHELL, SECRETARY OF LABOR; UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

KING PACKING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF LABOR

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OPINIONS BELOW

The opinion of the district court (R. 11-14) is reported at 107 F. Supp. 369. The opinion of the court of appeals (R. 177-181) appears at 216 F. 2d 618.

JURISDICTION

The judgment of the court of appeals (R. 181-182) was entered on October 21, 1954. A timely petition for rehearing was denied on December 10, 1954 (R. 182). The petition for a writ of certiorari

was filed on March 9, 1955, and was granted on April 25, 1955 (R. 182). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U.S.C. 201, *et seq.*), and the Portal-to-Portal Act of 1947, c. 52, 61 Stat. 84 (29 U.S.C. 251, *et seq.*), are set forth in the Appendix, *infra*, pp. 28-40.

QUESTION PRESENTED

Knifemen employed in respondent's meat-packing plant spend time, each workday, in sharpening the knives which they use in their jobs. This activity, which is indispensably and integrally related to the performance of their duties (butchering and trimming meat), is required by the employer to be done outside the scheduled eight-hour shift. Respondent provides a room and equipment for its accomplishment.

The question presented is whether this activity is a "principal," rather than a "preliminary" or "postliminary," activity within the meaning of the Portal-to-Portal Act, and hence compensable under the Fair Labor Standards Act.

STATEMENT

The Secretary of Labor brought this action to enjoin respondent from violating the overtime and record-keeping requirements of Sections 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act of 1938, as amended, in the employment of production

workers, and from violating Section 15(a)(1) of the Act by making interstate shipments of the goods produced by such workers.

The alleged violations of the Act (R. 3-8) arise from respondent's admitted failure (R. 8-11) to pay for or record the time spent by so-called knifemen in sharpening the knives which they use in the performance of their work.

Respondent is an interstate meat packer (Complaint, par. IV, R. 4; answer, par. IV, R. 9), engaged in slaughtering, butchering, dressing, and distributing meat and meat products. It employs at its packing plant 70 or 80 persons, including 21 to 24 knifemen whose compensation rights are involved in this litigation. The knifemen perform various butchering operations, 12 or 14 of them working in the killing room and the remainder in the cutting room (Fdg. IV, R. 16).

Various knives (R. 26-31) and three types of electric saws (R. 163) are used in the butchering operations. Some of the knives are furnished by the knifemen under the terms of their employment. These are the boning, the shaving, the legging, and the skinning or siding knives (R. 31). The saws and the more expensive loin-pulling, ham-skinning, shoulder-trimming, and spare-rib knives are furnished by respondent (R. 31, 66, 153). All of the knives, as well as the saws, must be sharp—"razor sharp," as one knifeman put it (R. 149)—for the proper performance of the work. As respondent's production manager and one of the knifemen explained, a dull knife would slow down production,

which is conducted on an assembly-line basis (R. 51-56), affect the appearance of the meat as well as the quality of the hides (R. 91-92), cause waste (R. 79), and make for accidents (R. 91-92). Thus, "a knife to be of any practical value in a knife job has to be . . . sharp" (R. 45-46).

Though the entire cost of keeping the saws in proper condition is borne by respondent, the knifemen are required to "sharpen their own knives outside the scheduled shift of eight hours and for this activity [they] are not compensated" (R. 178; also, Fdg. VII, R. 17). "While King Packing has a rule permitting the knives it furnishes to be sharpened during regular shift hours, employees ordinarily sharpen them on their own time, because the exigencies of the production line make it impracticable to do so during shift hours" (R. 178). Respondent's production manager testified that company-owned knives are sharpened "some during working hours and some on their own [the knifemen's] time" (R. 74; see, also, R. 51).

Respondent provides a room, outfitted with an emery wheel and grindstone, where the knife-sharpening is performed (R. 48-49). This work, which consists of edging and beveling operations (R. 90, 102, 113, 126, 135, 146, 160), is ordinarily done in the morning before the scheduled shift (R. 109). Sometimes, however, it is done during the noon hour or after quitting time (R. 77, 87).[1]

[1] An employee is free to take his own knives home at the end of the workday and, assuming that he has the necessary equipment, to sharpen them before returning to work the

The number of knives that a knifeman ordinarily sharpens in the morning is "two to four" (R. 75). Some knifemen, however, sharpen as many as five or six knives (R. 110). At the time a man is hired for, or promoted to, a knife job, it is understood that he will be required to sharpen knives. He is expected to perform that task as well as other tasks connected with the job (R. 47, 161).

The knifemen are paid by the hour and, excluding the knife-sharpening time in controversy, they work eight hours a day, five days a week.[2]

The district court concluded that the principal activity which knifemen are employed to perform is "the killing, cleaning and cutting of carcasses"; that knife-sharpening is not a part of such principal activity but is merely "preliminary" or "postliminary"; and that it is accordingly excluded from coverage under the Fair Labor Standards Act by Section 4(a)(2) of the Portal-to-Portal Act (R. 19). It therefore ordered the action dismissed (R. 22).

The court of appeals affirmed, holding that, even if knife-sharpening were "indispensable to" or an integral part of the butchering work, it was nonetheless "preliminary" and beyond coverage (R. 179). In reaching this conclusion, it recognized

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following day. This is rarely done in practice, one reason being that the knife might have its edge dulled in the process of being carried back and forth. R. 137, 80.

[2] In addition to knife-sharpening, knifemen must repeatedly steel their tools throughout the workday. This activity is done during the eight-hour shift, *i.e.*, on company time, and is compensated for. (R. 178.)

that *Steiner* v. *Mitchell*, 215 F. 2d 171 (C.A. 6), certiorari granted, 349 U.S. 914 (No. 22, this Term), supports the opposite view (*ibid.*).

SUMMARY OF ARGUMENT

1. By its express terms, Section 4 of the Portal-to-Portal Act preserves the *future* compensability of "principal" activities. It is sharply distinguished from Section 2, which *retroactively* relieved an employer from liability for back pay "on account of *any* activity," unless its compensability had been fixed by contract or established custom. Other provisions of the Act similarly demonstrate that Congress, in dealing retrospectively with the declared "existing emergency" resulting from unexpected suits for back pay, did not propose to alter permanently or drastically the future operation of the Fair Labor Standards Act.

The "preliminary" or "postliminary" activities excluded from coverage by Section 4 are those which fall outside the scope of the employee's "principal activity or activities." Thus, it is not decisive, as the court of appeals assumed, that an employee activity is one required to be performed outside of regular shift hours. Such an activity is nonetheless covered when, as in the instant case, it is significant and productive work integrally and indispensably related to performance of the job.

2. The legislative history establishes that the "key words" of Section 4—"principal activity or activities"—were deliberately chosen by Congress with a view to assuring compensation for all em-

ployee activities which are an integral part of the job. The report which accompanied the legislation so declared. And the same report gave as an illustration of compensable activity the pre-shift preparation of tools and machines for use in the day's work on the production line—the very type of activity involved in this case. The point was further illustrated and emphasized in statements made by sponsors of the measure during debate.

The same history makes clear that the terms "preliminary" and "postliminary" refer not to activities which are integrally and indispensably related to performance of the employee's productive work, but only to incidental activities—the "walking, riding, or traveling" expressly mentioned in Section 4(a)(1); checking in or out; waiting in line to receive pay checks; changing clothes and washing up (when not functionally or indispensably related to productive work).

In short, while Section 2 was designed, as one Senator stated it, to wipe out pending portal-to-portal cases so far as "humanly possible," Section 4 aimed to guarantee the future compensability of all significant and productive work integrally related to the job. "[I]t is our opinion," said one of the members of the Senate subcommittee, "that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity."

3. The Fair Labor Standards Amendments of 1949 provide further confirmation. New Section

3(o), excluding in certain defined circumstances clothes-changing and showering activities, demonstrates that, in other circumstances, these off-shift activities may constitute compensable "principal" activity. See *Steiner* v. *Mitchell*, 215 F. 2d 171 (C. A. 6), certiorari granted, 349 U. S. 914 (No. 22, this Term).

Moreover, Section 16(c) of the Amendments declares that existing administrative interpretations, not inconsistent with the Amendments, "shall remain in effect." Outstanding at the time, and implicitly ratified by Congress, was the Administrator's interpretation that certain "preparatory activities" which the Administrator had always regarded as work and compensable under the Fair Labor Standards Act "remain so under the Portal Act . . ." Cf. *Mancja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270.

ARGUMENT

The Sharpening of Knives Is an Employee Function Integrally and Indispensably Related to the Knifemen's Butchering and Meat-Trimming Work. It Accordingly Constitutes a "Principal Activity" Within the Meaning of Section 4 of the Portal-to-Portal Act, Compensable Under the Fair Labor Standards Act

On this record, there is no room for dispute that the off-shift sharpening of knives is an indispensable and integral part of the butchering and knife-trimming work performed by knifemen in respondent's plant (*supra*, pp. 3-5). The court below did not reach a contrary conclusion as to the facts. It deemed immaterial the close and vital

relationship between the sharpening of the knives and their actual use in butchering. For the court of appeals, the decisive consideration was that it conceived the Portal-to-Portal Act as designed to eliminate the compensability of all activities performed off the production line, before or after the scheduled workday.

In our view, this interpretation of the statute is fundamentally in error and is caused largely by a failure to draw a clear distinction between the provisions of the Act relating to claims antedating the statute and the provisions having prospective operation. We shall urge that, so far as the future was concerned, Congress provided for the compensability of all activities which are so closely and integrally related to the principal work of the employee as to be deemed an essential part of it, irrespective of whether they are performed on shift or off shift. Its purpose was to exclude from future coverage only those activities whose relation to the principal activity of the employee is casual, indirect, or remote. This is borne out by the statutory language and scheme of the Portal-to-Portal Act and finds overwhelming confirmation in a legislative history which is not only unusually graphic and abundant but is focused directly on the type of problem here involved. The conclusion is further supported by the 1949 amendments to the Fair Labor Standards Act.

A. *Under the Portal-to-Portal Act's Criteria Relating to Future Liability, Activities Performed Off Shift Are Compensable if They Fall within the Scope of the Employee's "Principal Activity or Activities."*

The Portal-to-Portal Act was adopted in 1947 primarily to meet an "existing emergency" resulting from claims which, if allowed, would have created "wholly unexpected liabilities, immense in amount and retroactive in operation." Secs. 1(a)(b), 29 U. S. C. 251(a)(b). As we shall indicate, however, a sharp distinction is to be drawn between the broad exclusionary standard adopted in relation to suits for back pay for alleged pre-Portal Act violations (Sec. 2) and the discrete, more liberal, set of criteria governing future (*i. e.*, post-enactment) rights of compensation (Sec. 4). In this case, it is only Section 4 which is involved.

Section 4[3] exempts from application of the Fair

[3] The Section declares in pertinent part:

Section 4(a). Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular

Labor Standards Act of 1938 activities which are preliminary or postliminary to the employee's "principal activity or activities." It does not exempt all activities performed prior or subsequent to the employee's regularly scheduled workday or work shift, although, if that had been the purpose of Congress, it would have been a simple matter to say so. That Congress chose, instead, to exclude only that which comes before or after the commencement or termination of the employee's *principal activities* gives strong indication, on the face of the statute, that the lawmakers were well aware that in many situations employees might be required to perform, before or after regular hours, work for which they should be compensated.

In striking contrast, it should be noted, Congress provided in Section 2,[4] relating to liability for back

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workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

[4] The relevant portion reads as follows:

Sec. 2. (a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after [May 14, 1947]), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to [May 14, 1947] except an activity which was compensable by either—

(1) an express provision of a written or non-written contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such

(pre-1947) pay, that the employer would not be liable "on account of any activity" unless the compensability of such activity had been fixed by an express provision of contract or by an established custom.

Other provisions of the Portal-to-Portal Act similarly show that Congress, in dealing with the declared "existing emergency," did not propose to alter drastically and permanently the future operation of the Fair Labor Standards Act. Thus, Section 3 (*infra*, pp. 33-34), which relaxed the settled rule that claims for wages or liquidated damages under the Fair Labor Standards Act cannot be compromised or waived, see *Overnight Motor Co.* v. *Missel*, 316 U. S. 572; *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, was carefully drawn so as to apply only to claims based on "activities engaged in prior to the date of the enactment of this Act."[5] And Sections 9 and 10 (*infra*, pp. 36-38), relating to "good faith" defenses, likewise differentiate between past and future claims. Reliance upon "*any* administrative regulation, order, ruling, approval, or interpretation, of *any* agency of the

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activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

[5] Significantly, no compromise of wage claims arising in the future is authorized. And Section 11 (*infra*, pp. 38-39) makes the award of liquidated damages in an employee action under the Fair Labor Standards Act a matter for the sound discretion of the court.

United States" (Sec. 9; emphasis added), is made a defense to past claims. But Section 10 provides that in the future it must be shown that reliance was placed upon a written regulation, order, etc., issued on the authority of specified officials of the Department of Labor.

It is thus plain from the scheme and structure of the Act that the broad exclusionary standard adopted in relation to past claims is not to be carried over in adjudication of claims arising subsequent to the Act. Whatever ambiguity may exist as to the scope of the phrase "principal activity or activities," a term used only in relation to future claims, is resolved by the legislative history to which we now turn.

B. *The Legislative History Establishes the Purpose of Congress to Require Compensation for Activities which Are an Integral Part of the Employee's Principal Work, Whether Such Activities Are Performed Before, During, or After the Scheduled Workday.*

The Senate Report accompanying the Portal-to-Portal Act (S. Rept. No. 48, 80th Cong., 1st Sess.) declared (p. 48) that "[t]he term 'principal activity or activities' includes all activities which are an integral part thereof . . ."[6] The Report

[6] Though the Portal-to-Portal Act had its origin in a bill introduced by Congressman Gwynne, Section 4, the provision here involved, was added by the Senate. The original Gwynne bill contained no comparable section (H. Rept. 326, 80th Cong., 1st Sess., p. 12).

then provides two specific examples of what is intended (*ibid.*):

> (1) In connection with the operation of a lathe an employee will frequently at the commencement of his workday *oil, grease, or clean his machine, or install a new cutting tool. Such activities are an integral part of the principal activity*, and are included within such term.
>
> (2) In the case of a garment worker in a textile mill, who is required to report 30 minutes before other employees report to commence their principal activities, and who during such 30 minutes distributes clothing or parts of clothing at the workbenches of other employees and *gets machines in readiness for operation* by other employees, such activities are among the principal activities of such employee. [Emphasis added.][7]

The meat cutter, when sharpening the knives essential to his work, is plainly no less engaged in "an integral part of the principal activity" than the "lathe operator" who, "at the commencement

[7] Petitioner in No. 22 points out (Br., pp. 22-23) that Representative Gwynne stated, after Section 4 had been added by the Senate, that the laying out of clothing by garment workers would not be compensable in the absence of an agreement or custom. This is directly contradicted by the examples given in the Senate Report, *supra*. It is to be emphasized that the Senate subcommittee added Section 4, and that Representative Gwynne's original bill had no equivalent. To the extent that Representative Gwynne's statements suggest that the standards of Sections 2 and 4 are the same, they are refuted both by the statutory language and by the repeated statements (see *infra*, pp. 19-21) of those who sponsored Section 4.

of the workday," must "oil, grease, or clean his machine, or install a new cutting tool."

The Congressional purpose in adopting the term "principal activity or activities" was very fully explained on the floor. Senator Cooper,[5] one of the sponsors of the legislation, stated (93 Cong. Rec. 2297) "that in the use of the words 'principal activity' we have preserved to the employee the rights and the benefits and the privileges which have been given to him under the Fair Labor Standards Act, because it is our opinion that those activities which are so closely related and are an integral part of the principal activity, indispensable to its performance, must be included in the concept of principal activity." Senator McGrath thereupon declared (*ibid.*):

> Mr. McGrath: I think that at this point we might very definitely make contribution to the legislative history of what we are doing here. Am I correct in understanding the Senator to say that what the majority of the committee proposes is that any activity of a worker shall be considered a part of his principal activity if the doing of that act is indispensable to the performance of the rest of his day's work?

Senator Cooper replied by giving the two examples appearing in the Senate Report, set out above. Pursuing the matter further, Senator Mc-

[5] Senator Cooper was a member of a three-man subcommittee of the Committee on the Judiciary which conducted hearings on the measure (93 Cong. Rec. 2124) and formulated the Senate version. (93 Cong. Rec. 2131; 93 Cong. Rec. 2293).

Grath posed the case of a worker in a chemical factory whose duties require him to put on special clothing at the beginning of the workday and to shower at its conclusion—a type of activity which is indispensable but which must necessarily be performed while the employee is off the production line." The colloquy is as follows (*id.*, p. 2298):

> Mr. McGrath: There are innumerable instances of operations which have to be performed that are not covered in these two particular examples. I think of one at the moment. In certain of our chemical plants workers are required to put on special clothing and to take off their clothing at the end of the workday, and in some of the plants they are required to take shower baths before they leave. Does the Senator regard such activity as that as coming within the compensable workday?
>
> Mr. Cooper: I am very happy that the Senator has asked the question, because I believe it gives the opportunity of drawing a fine distinction between the type of activity which we consider compensable and the type which should not be compensable. *In accordance with our intention as to the definition of "principal activity," if the employee could not perform his activity without putting on certain clothes, then the time used in changing into those clothes would be compensable as part of his principal activity.* On the other hand, if changing clothes were merely a convenience to

> the employee and not directly related to the specific work, it would not be considered a part of his principal activity, and it follows that such time would not be compensable. [Emphasis added.]

Senator Barkley was likewise concerned that the use of the words "preliminary" and "postliminary" should not be deemed to imply that an indispensable off-shift activity was unprotected by the Fair Labor Standards Act. Thus, he posited the following case (93 Cong. Rec. 2350):

> Mr. BARKLEY: * * * The other day * * * I asked whether a certain situation which I described would be covered, and if so, to what extent and in what manner. Suppose that a man is a machinist or a mechanic of some kind. *. *. * He is required to enter upon the actual labor, which might be termed his principal employment, at 8 o'clock in the morning and to spend 8 hours at such principal employment. But let us suppose that his employer requires him to be on the grounds and within the shop at 7:30 in the morning in order that he may spend half an hour *sharpening and preparing the tools with which he himself or his colleagues in the factory are to work.* * * *.
>
> Is that a part of his principal employment, or is that preliminary; or, if he is required to do it after the close of the shop in the afternoon, is that a part of the "postliminary" work for which there is to be no compensation unless

there is a contract or unless it has been the practice and custom for the employer to pay for the extra work done at his command?

* * * * *

Mr. COOPER: The distinguished Senator has perhaps not had the opportunity to read the report of the committee. Let me say that on page 48 of the report of the committee that exact situation, or one as nearly comparable to it as probably could be cited, is discussed. In the report it is clearly stated that under such circumstances *it is the intention of the framers of the bill that such activities shall be compensable, as a part of the principal activity.* [Emphasis added.]

Senator Barkley's example of "sharpening and preparing the tools" is, of course, precisely descriptive of the activity here in issue.

The legislative materials also indicate that the underlying economic rationale of Section 4 was to distinguish between activity which is incidental and non-productive (though, doubtless, related to employment) and activity indispensably related to the productive process. Thus, the same Senate Report which declared that the cleaning and oiling of tools and machinery would be compensable (see *supra*, p. 14) gives the following examples of non-compensable activities (S. Rept. No. 48, *supra*, p. 47): "Checking in or out and waiting in line to do so; changing clothes, washing up or showering,

waiting in line to receive pay checks."[9] Senator Cooper further explained on the floor (93 Cong. Rec. 2300) that the aim of Section 4 was to eliminate the requirement of "unearned" compensation for activities of the employee "which in no way enter into the production of goods" and would add "to the cost of goods * * * to the consumer." The bill, he emphasized (*ibid.*), "would preserve to the worker the rights he has gained under the Fair Labor Standards Act."

The sharp distinction which the lawmakers drew between Section 2 and Section 4 likewise shows that drastic curtailment of future rights of compensation was not intended, and that the term "principal activity" must be deemed to cover all employee activities integrally and indispensably related to the productive process.

The aim of Section 2 was to wipe out the large number of "existing portal-to-portal cases" which had been filed following this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680. See 93 Cong. Rec. 2125, 2126, 2293, 2295. As Senator Donnell explained (*id.*, pp. 2125-2126):

> But the real purpose of this proposed legislation [Section 2] is to dispose of the existing portal-to-portal cases, and we do not see any way to do except to take the entire activities of the entire 24-hour day, and provide by law

[9] The reference to clothes changing and showering is to be compared with Senator Cooper's explanation (see p. 16, *supra*) that in certain circumstances, *e.g.*, in a chemical plant, these activities would be compensable.

that none of them shall be compensable unless by contract or custom.

* * * * *

I should say that recognizing the grave economic problem, what we do is to undertake to wipe out all pending portal-to-portal cases, so far as it is humanly possible to do so. *In order to do that, we find it necessary to provide that any activity which is not compensable, either by contract, or by custom or practice not inconsistent with the contract, shall not be compensable.* [Emphasis added.]

The "key words" in Section 4, as pointed out by Representative Walter (one of the House Managers when the bill went to conference), are "principal activity or activities" (93 Cong. Rec. 4389). They were designed to apply to future claims a different and far more liberal rule than that made applicable to past claims. The same point is fully developed in the following colloquy between Senator Pepper and Senator Cooper (93 Cong. Rec. 2299):

Mr. PEPPER: The Senator has referred in his discussion with the Senator from Rhode Island to page 48 of the report of the committee, where there are set forth two instances of activities which are so interrelated to principal activities that they could be construed as principal activities and therefore compensable.

* * * * *

If I correctly understand the Senator, those incidental activities are to be construed under [the] part * * * of the bill dealing with *future claims as compensable work*, as principal activities. Is that correct?

Mr. COOPER. Excluding the use of the word "incidental." I do not think those activities are incidental. I think they are an integral part of the employment.

Mr. PEPPER. I should like to ask the able Senator from Kentucky: Would workers who *have been* engaged in such activities as we have just been discussing be precluded under [the] part * * * of the committee bill, dealing with *existing* claims, from recovery for such work?

Mr. COOPER. Exactly. [Emphasis added.] [10]

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[10] Senator Donnell's explanation of the bill likewise draws a careful distinction between 'past claims' (Section 2) and future rights' (Section 4):

"Mr. President, we were discussing part II of the bill. I may say, as previously indicated, that part II relates to existing claims. The purpose of part II is to deal solely with claims which exist at the time of the enactment of the pending measure.

"The Senate will observe in due time that *the approach which we make in the bill is quite different in the case of existing claims as contradistinguished from claims arising in the future*." (93 Cong. Rec. 2179.)

"Mr. President, I have analyzed part II of the act, which relates, as I have indicated, to existing claims. *I now come to part III, which relates to future claims. Here, as I have indicated, we have approached the subject matter from quite a different angle.* We have taken the position under part II that in the first place we should extinguish, cancel, annul, and

In summary, the legislative materials and history plainly show that, while Congress proposed to declare non-compensable an employee's incidental and unproductive activities, it also aimed to assure compensation for all activities which are a part of the productive process or integrally and indispensably related thereto. The very examples of compensable activity set forth in the Senate Report and stressed on the floor by the sponsors—including, particularly, the case of the worker who readies his tools or machine before the commencement of the regular workshift—perfectly describe the case at bar. By the same token, the history of the Act refutes unmistakably the court of appeals' view that an activity indispensably related to the productive process is to be deemed "preliminary" or "postliminary" merely because it is performed outside of the regularly scheduled hours spent on the production line.

As the foregoing history also shows, there is no

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make unenforcible the collection of moneys in portal-to-portal suits. * * *" (93 Cong. Rec. 2181.)

* * * * * * *

"I was about to proceed to part III, which relates to future claims, that is to say, which governs employees in their relations with the employers after the enactment of this legislation. It determines what activities are compensable and what are not.

"Mr. President, here we have come to the conclusion that we do not legislate as to the entire 24-hour period, for if we do it may well be, and in fact will be, that we shall have legislated out of existence some claims which may bring about an injustice to the plaintiffs therein." (93 Cong. Rec. 2181.) (Emphasis added.)

reason to believe, as the court of appeals erroneously assumed (R. 179-180), that Congress broadly intended to make permanently non-compensable all of the activities (including the assembling and sharpening of tools) which this Court passingly described as "preliminary" in the course of its *Mt. Clemens* opinion (328 U.S. at 692-693). At that time, this Court was not using the word "preliminary" as a word of art or as a statutory term, and it was not, of course, considering the word in relation to the term "principal activity." [11] More pointedly, Congress, as observed above, expressed its purpose to preserve the compensability of some of the very activities (*e.g.*, the preparation of tools) characterized as preliminary in *Mt. Clemens*. Plainly, then, the meaning which Congress ascribed to the words "preliminary" and "principal" must

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[11] The issue in *Mt. Clemens*, which involved a pottery manufacturer, was whether the activities in question constituted "work" under the then outstanding tests. Since those tests were based on factors other than the relationship of activities to the employee's "principal" employment, it cannot be determined from the decision how essential the various activities there involved were to the making of pottery. For all that appears, many of the activities may have been of only incidental importance and far less closely related to the making of pottery than is the sharpening of knives to the butchering and trimming of meat. Note, in this connection, that all of the various "preliminary" activities in that case did not consume more than three or four minutes a day at the most (328 U.S. at 683). Indeed, with respect to the activity described as "assembling and sharpening tools," it appeared on remand that there was nothing to it. See the finding in *Anderson v. Mt. Clemens Pottery Co.*, 69 F. Supp. 710, 715 (E.D. Mich.): "There is no evidence that these employees had to assemble and sharpen their tools."

be derived from their context in the statute and from the specific legislative explanations rather than from this Court's earlier, passing use of one of those words in another context.

The court of appeals' reliance upon House Report No. 71, 80th Cong., 1st Sess., and a group of cases decided under Section 2 (see R. 179-180) is misplaced. The cited report deals with the original House version of the Portal-to-Portal Act, which made no distinction between past and future claims (see p. 13, note 6, *supra*), and is accordingly of no aid in interpreting Section 4, which was subsequently added by the Senate. And, as already indicated, the Section 2 cases are not in point because they involve application of a different statutory standard—one which eliminated claims based on *any* activity which was not made compensable by a fixed provision of contract or by established custom.[12] See *Steiner* v. *Mitchell*, 215 F. 2d 171, 173 (C.A. 6) (pending as No. 22, this term), a proceeding under Section 4 in which the court refused to consider the Section 2 cases upon which the employer relied.[13]

[12] Section 2 not only excluded from coverage activities not made compensable by contract, custom, or practice, but divested the courts of jurisdiction to entertain suits based on such activities. Most of the decisions under Section 2 deal with the sufficiency of pleadings to satisfy jurisdictional requirements. See, *e.g.*, *Mackert* v. *Swift & Co.*, 173 F. 2d 517, 520-521 (C.A. 2).

[13] Decisions under Section 4 are few in number, though various suits are pending or in the offing. The following cases, in addition to the instant case, deal with the meaning of the Section's terminology: *Tobin* v. *Alma Mills*, 92 F. Supp. 728

C. The 1949 Amendments to the Fair Labor Standards Act Confirm the Conclusion that Section 4 of the Portal-to-Portal Act Did Not Exclude from Coverage All Activities Performed Outside the Hours Spent on the Production Line.

The Fair Labor Standards Amendments of 1949 confirm the view that Section 4 of the Portal-to-Portal Act does not exclude from coverage all activities performed outside the hours spent on the production line.[14] Thus, new Section 3(o) (*infra*, p. 39) provides that in computing hours of employment "there shall be excluded any time spent

(W.D. S.C.), modified on other grounds, 192 F. 2d 133 (C.A. 4), certiorari denied, 343 U.S. 933, declaring the cleaning of spinning frames by mill workers to be a "principal activity" though performed outside of regular shift hours; *Mitchell* v. *Southeastern Carbon Paper Co.*, 12 WH Cases 559 (C.A. 5, June 28, 1955), holding non-compensable bathing and clothes-changing activities of employees in a carbon-paper plant; *Steiner* v. *Mitchell*, 215 F. 2d 171 (C.A. 6), certiorari granted, 349 U.S. 914 (No. 22), holding similar activities in a battery plant to be compensable; *Cieminoczolowski* v. *Q. O. Ordnance Corp.*, 12 WH Cases 469 (C.A. 8, April 29, 1955, petition for rehearing pending), holding non-compensable similar activities in an explosives manufacturing plant; *McComb* v. *C. A. Swanson & Sons*, 77 F. Supp. 716 (D. Neb.), holding non-compensable similar activities in a food-processing plant. See also *Gemath* v. *National Biscuit Co.*, 81 F. Supp. 213, 214 (S.D. N.Y.), appeal dismissed, 177 F. 2d 963 (C.A. 2), allowing employees in a dismissed Section 2 case to file a supplemental complaint for subsequent claims on the ground that the "statutory standard for compensable activities engaged in after the effective date of the Act is different from that applicable to activities prior thereto."

[14] "It is settled that 'subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject'." *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277; *Sarles* v. *United States*, 152 U.S. 570, 576.

in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee." The exclusion in certain defined circumstances, of clothes-changing and showering activities shows that, in other circumstances, these pre-shift and post-shift activities may meet the test of compensability. This was recognized by the Court of Appeals for the Sixth Circuit in holding that essential clothes changing and showering by employees working with toxic materials in a battery plant is compensable "principal activity." *Steiner* v. *Mitchell*, 215 F. 2d at 173 (pending as No. 22, this Term).

Moreover, Section 16(c) of the 1949 Amendments declares that existing administrative interpretations, not inconsistent with the Amendments, "shall remain in effect." Outstanding at the time was the Administrator's interpretation that certain "preparatory activities [those 'closely related to a principal activity' and 'indispensable to its performance'], which the Administrator has always regarded as work and as compensable under the Fair Labor Standards Act, remain so under the Portal Act * * *." Among such activities the Administrator expressly included the two examples cited in Senate Report No. 48, 80th Cong., 1st Sess., page 48, and Senator Cooper's example of necessary clothes-changing and bathing activities in a chemical plant (*supra*, pp. 14, 16-18). See *General*

Statement as to the effect of the Portal-to-Portal Act of 1947 on the Fair Labor Standards Act of 1938, p. 13 (29 C.F.R. 790, at 790.8, 12 F.R. 7655). This administrative interpretation was specifically brought to the attention of Congress in connection with proposed Section 3(o).[15] Congress made no change affecting this interpretation save for the limited exception from coverage written into Section 3(o)—an exception, as observed above, premised upon the view of the law expressed in the interpretation. The Administrator's interpretation, thus ratified by Congress, remained in force. Section 16(c). *See Alstate Construction Co. v. Durkin*, 345 U.S. 13, 16-17; *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254, 270.

[15] See letter of William A. Quinlan, General Counsel, Associated Retail Bakers of America, printed in Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 1st Sess., on S. 58, S. 67, S. 92, S. 105, S. 190, S. 248, and S. 653, p. 1173, at 1175-1179.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Statutory Provisions Involved.

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910 (29 U. S. C. 201 *et seq.*):

* * * * *

Sec. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 11. * * *

(c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14;

* * * * *

(5) to violate any of the provisions of section 11 (c) or any regulation or order made or continued in effect under the provisions of section 11 (d), or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

SEC. 17. The district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided*, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. 251 *et seq.*:

* * * * *

Part II

Existing Claims

SEC. 2. RELIEF FROM CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after the date of the enactment of this Act), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(b) For the purposes of subsection (a), an activity shall be considered as compensable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after the date of the enactment of this Act, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healey Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section.

(e) No cause of action based on unpaid

minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any interest in such cause of action, shall hereafter be assignable, in whole or in part, to the extent that such cause of action is based on an activity which was not compensable within the meaning of subsections (a) and (b).

SEC. 3. COMPROMISE OF CERTAIN EXISTING CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Any cause of action under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to the date of the enactment of this Act, or any action (whether instituted prior to or on or after the date of the enactment of this Act) to enforce such a cause of action, may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; except that no such action or cause of action may be so compromised to the extent that such compromise is based on an hourly wage rate less than the minimum required under such Act, or on a payment for overtime at a rate less than one and one-half times such minimum hourly wage rate.

(b) Any employee may hereafter waive his right under the Fair Labor Standards Act of 1938, as amended, to liquidated damages, in whole or in part, with respect to activities engaged in prior to the date of the enactment of this Act.

(c) Any such compromise or waiver, in the absence of fraud or duress, shall, according to the terms thereof, be a complete satisfaction of such cause of action and a complete bar to any action based on such cause of action.

(d) The provisions of this section shall also be applicable to any compromise or waiver heretofore so made or given.

(e) As used in this section, the term "compromise" includes "adjustment", "settlement", and "release."

Part III

Future Claims

SEC. 4. RELIEF FROM CERTAIN FUTURE CLAIMS UNDER THE FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, THE WALSH-HEALEY ACT, AND THE BACON-DAVIS ACT.—

(a) Except as provided in subsection (b), no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of

such employee engaged in on or after the date of the enactment of this Act—

(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

(b) Notwithstanding the provisions of subsection (a) which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

(c) For the purposes of subsection (b), an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion of the day with respect to which it is so made compensable.

(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section.

* * * * *

SEC. 9. RELIANCE ON PAST ADMINISTRATIVE RULINGS, ETC.—In any action or proceeding commenced prior to or on or after the date of the enactment of this Act based on any act or omission prior to the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act

or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

SEC. 10. RELIANCE IN FUTURE ON ADMINISTRATIVE RULINGS, ETC.—

(a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect

to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3) in the case of the Bacon-Davis Act—the Secretary of Labor.

SEC. 11. LIQUIDATED DAMAGES.—In any action commenced prior to or on or after the date of the enactment of this Act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liqui-

dated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

Fair Labor Standards Amendments of 1949 (c. 736, 63 Stat. 910, 29 U.S.C. 201, *et seq.*):

* * * * *

SEC. 3. (o) HOURS WORKED.—In determining for the purposes of sections 6 and 7 the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

* * * * *

SEC. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary, in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the ex-

tent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

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